A

Hap Seng Credit Sdn Bhd v Mohamed bin A Ralim & Ors

B

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12BNCC-10–11 OF 2014
MOHD NAZLAN JC
30 NOVEMBER 2015

C

Hire Purchase — Hire purchase agreement — Allegation that agreement was void — Parties entered into hire purchase agreement — Respondents default in payment — Appellant terminated agreement and claimed for balance purchase sum — Whether appellant required under Banking and Financial Institutions Act 1989 to be in possession of finance company business license — Whether agreement subjected to Hire-Purchase Act 1967 — Whether Moneylenders Act 1951 applicable to agreement — Whether respondents should be held responsible to pay balance purchase sum — Whether appellant entitled to interest — Banking and Financial Institutions Act 1989 ss 2 & 4 — Hire-Purchase Act 1967 — Moneylenders Act 1951

D

E

The respondents entered into a hire purchase agreement ('the said agreement') with the appellant for the purchase of one unit of Rebuild Hino Tipping Truck ('the said vehicle'). The key financing term in the said agreement was that the respondents entered into a hire purchase agreement for the amount of RM272,185 to be paid by way of an initial payment of RM80,000 and the remainder in 36 monthly rental installments. The payment obligation of the respondents under the said agreement was guaranteed by the fourth and fifth defendants in the court below. The respondents failed to pay the monthly repayments and consequently the appellant terminated the said agreement and filed an action in the sessions court for the entire outstanding amount of RM168,787.48 as at 23 October 2013. The sessions court held that the said agreement was void and dismissed the appellant's claim, hence this appeal. The issues for court's decision were: (a) whether the appellant was required under the now-repealed Banking and Financial Institutions Act 1989 ('the BAFIA') to be in possession of the finance company business license; (b) whether the said agreement subjected to Hire-Purchase Act 1967 ('the HP Act'); (c) whether the Moneylenders Act 1951 applicable to the said agreement; (d) whether the respondents should be held responsible to pay the balance purchase sum; and (e) whether the appellant was entitled to interest at 2% per month.

F

G

H

I

Held, setting aside the decision of the sessions court and allowing the appeal with costs of RM2,000:

(1) In the instant case, since the appellant did not operate any deposit-taking business as per limb (a) of s 2(1) of the BAFIA, it could not be said to be

carrying on finance company business, regardless of whether or not it was running a hire purchase business under limb (b)(iii) of the same section. There was thus no necessity for the appellant to hold a license under s 4 of the BAFIA and that BAFIA did not regulate the business of the appellant. The finding of the sessions court that the appellant's failure to hold a finance company business license under BAFIA rendered the said agreement to be not valid, void and unenforceable was therefore manifestly erroneous and ought to be reversed (see para 23).

(2) The HP Act is only applicable to hire purchase agreements in relation to goods specified in the first schedule to the HP Act. Since the maximum permissible laden weight to bring the vehicles within the first schedule to the HP Act was 2,540kg, the considerably much greater weight of the said vehicle at 27,000kg (as per the registration card for the said vehicle) clearly rendered the HP Act inapplicable. Thus, the finding by the learned sessions court judge that the said agreement in the instant case to be not valid, void and unenforceable because the same did not comply with the requirements of the HP Act was plainly unsustainable (see paras 24, 26 & 32).

(3) The transaction arising from the said agreement between the appellant and the respondents could not be characterised as other than a hire purchase facility pure and simple, and any assertion that it was a loan transaction was a patent misapprehension of the law, for the Moneylenders Act 1951 and the regulations made thereunder were wholly inapplicable to the instant case (see para 40).

(4) As the hirers of the said vehicle under the said agreement, and in light of the incontrovertible evidence, especially the clear written documentary support, it was an inescapable conclusion that the respondents were clearly responsible to make good their shortcomings in accordance with the agreed terms of the said agreement. Further, it is well-established in the law of contract that a person who is a party to a written contract is bound by the terms of the contract whether or not he understands the language in which it is documented, in the absence of fraud or misrepresentation. No allegation of fraud or misrepresentation had been raised, let alone evidenced in the instant case (see paras 45–46).

(5) As the parties have agreed that the appellant was entitled to charge late interest, it was not open for the respondents to raise an objection to the very idea which they too had agreed upon (see para 51).

[Bahasa Malaysia summary

Pihak responden telah membuat suatu perjanjian sewa beli ('perjanjian tersebut') dengan pihak perayu untuk membeli satu unit Rebuild Hino Tipping Truck ('kenderaan tersebut'). Syarat utama pembiayaan dalam perjanjian tersebut ialah responden membuat perjanjian sewa beli bagi jumlah

RM272,185 dibayar secara bayaran pendahuluan sebanyak RM80,000 dan bakinya secara 36 ansuran sewa bulanan. Obligasi pembayaran responden di bawah perjanjian tersebut dijamin oleh defendan keempat dan kelima di mahkamah di bawah. Pihak responden telah gagal membayar pembayaran balik bulanan dan oleh itu pihak perayu telah menamatkan perjanjian tersebut dan memfailkan tindakan di mahkamah sesyen untuk keseluruhan jumlah RM168,787.48 yang tertunggak setakat 23 Oktober 2013. Mahkamah sesyen memutuskan bahawa perjanjian tersebut telah terbatal dan menolak permohonan perayu, oleh yang demikian rayuan ini dibuat. Isu yang perlu diputuskan oleh mahkamah ini ialah: (a) sama ada perayu dikehendaki di bawah Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA') yang telah dimansuhkan untuk memiliki lesen perniagaan syarikat kewangan; (b) sama ada perjanjian tersebut tertakluk kepada Akta Sewa Beli 1967 ('Akta Sewa Beli'); (c) sama ada Akta Pemberi Pinjam Wang 1951 terpakai kepada perjanjian tersebut; (d) sama ada responden patut dipertanggungjawabkan untuk membayar baki wang pembelian; dan (e) sama ada perayu berhak ke atas faedah sebanyak 2% sebulan.

Diputuskan, mengetepikan keputusan mahkamah sesyen dan membenarkan rayuan perayu dengan kos sebanyak RM2,000:

(1) Dalam kes ini, memandangkan perayu tidak menjalankan operasi perniagaan mengambil deposit sebagaimana dalam bahagian (a) s 2(1) BAFIA, perayu tidak boleh dikatakan menjalankan perniagaan syarikat kewangan, tidak kira sama ada perayu menjalankan perniagaan sewa beli di bawah bahagian (b)(iii) seksyen yang sama atau tidak. Oleh yang demikian, tidak terdapat keperluan bagi perayu untuk memegang lesen di bawah s 4 BAFIA dan BAFIA tidak mengawal selia perniagaan perayu. Pendapat mahkamah sesyen bahawa kegagalan perayu memegang lesen perniagaan syarikat kewangan di bawah BAFIA menjadikan perjanjian tersebut tidak sah, terbatal dan tidak boleh dikuatkuasakan adalah kekhilafan yang jelas dan sepatutnya diakaskan (lihat perenggan 23).

(2) Akta Sewa Beli hanya terpakai bagi perjanjian sewa beli yang berhubung dengan barang yang dinyatakan dalam jadual pertama kepada Akta Sewa Beli. Memandangkan berat muatan maksimum yang dibenarkan untuk menjadikan kenderaan tersebut dalam jadual pertama kepada Akta Sewa Beli adalah sebanyak 2,540kg, maka berat kenderaan tersebut yang lebih berat iaitu sebanyak 27,000kg (sebagaimana dalam kad pendaftaran kenderaan tersebut) jelas menjadikan Akta Sewa Beli tidak terpakai. Oleh yang demikian, pendapat oleh hakim mahkamah sesyen bahawa perjanjian tersebut dalam kes ini menjadi tidak sah, terbatal dan tidak boleh dikuatkuasakan kerana perjanjian itu tidak mematuhi kehendak

Akta Sewa Beli adalah begitu jelas tidak dapat dipertahankan (lihat perenggan 24, 26 & 32).

(3) Transaksi yang timbul daripada perjanjian tersebut antara perayu dengan responden tidak boleh disifatkan sebagai selain daripada kemudahan sewa beli yang mudah dan jelas, dan apa-apa penegasan bahawa transaksi itu merupakan suatu transaksi pinjaman merupakan suatu salah anggapan undang-undang yang nyata, kerana Akta Pemberi Pinjam Wang 1951 dan peraturan-peraturan yang dibuat di bawahnya tidak terpakai kesemuanya pada kes ini (lihat perenggan 40).

(4) Sebagai penyewa kenderaan di bawah perjanjian tersebut, dan memandang kepada keterangan yang tidak dapat dipertikaikan, terutama sokongan dokumen bertulis yang jelas, ia merupakan suatu kesimpulan yang tidak dapat dielakkan bahawa responden jelas bertanggungjawab untuk menyempurnakan kelemahan mereka mengikut syarat yang dipersetujui dalam perjanjian tersebut. Tambahan lagi, ia merupakan suatu undang-undang kontrak yang mantap bahawa seseorang yang merupakan pihak kepada suatu kontrak terikat dengan syarat-syarat kontrak sama ada dia memahami bahasa sebagaimana ia didokumenkan, jika tiada fraud atau salah nyataan. Tiada pengataan fraud atau salah nyataan, apalagi keterangan dalam kes ini (lihat perenggan 45–46).

(5) Oleh sebab pihak-pihak telah bersetuju bahawa perayu berhak untuk mengenakan faedah lewat, maka responden tidak boleh membangkitkan bantahan kepada idea yang mereka sendiri turut bersetuju (lihat perenggan 51).]

Notes

For cases on allegation that agreement was void, see 7(3) *Mallal's Digest* (5th Ed, 2015) paras 4995–4998.

Cases referred to

Ahmad bin Udoh & Anor v Ng Aik Chong [1970] 1 MLJ 82, FC (refd)

Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman [2014] 11 MLJ 464; [2013] 8 CLJ 516, HC (refd)

Ambank (M) Bhd v KT Steel Sdn Bhd & Ors [2011] 5 CLJ 500, CA (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Credit Corporation (M) Bhd v The Malaysian Industrial Finance Corp & Anor [1976] 1 MLJ 83 (refd)

Gemilang Mirza Sdn Bhd & Ors v Public Prosecutor [2014] 11 MLJ 300; [2013] 9 CLJ 214, HC (not folld)

HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) V LH Timber Products Sdn Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors [2005] 6 MLJ 625; [2005] 8 CLJ 249, HC (refd)

Ho Weng Leong v Ng Kee Chin [1996] 5 MLJ 139, HC (refd)

Imbangan Utama Sdn Bhd v Lotan Engineering Works Sdn Bhd [2002] 2 MLJ 313; [2002] 8 CLJ 497, HC (refd)

Kesang Leasing Sdn Bhd v Mohd Yusof bin Ismail & Anor [1990] 1 MLJ 291, HC (refd)

Lee Cheng Ting T/A Perniagaan Jia Zing Ten v MBf Finance Bhd [2005] 6 CLJ 479, HC (refd)

Light Style Sdn Bhd v KFH Ijarah House (M) Sdn Bhd [2009] 4 MLJ 575; [2009] 3 CLJ 370, HC (refd)

Low Ping Ming v MBf Finance Bhd [2000] 2 CLJ 307, HC (refd)

MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise [2005] 3 MLJ 208; [2005] 1 CLJ 305, CA (refd)

MBf Finance Bhd (formerly Known As Malaysia Borneo Finance Corporation (M) Bhd) v Ting Kah Kuong & Anor [1993] 3 MLJ 73, HC (refd)

Mayor Singh v Lau Geok Swee [1960] 1 MLJ 285 (refd)

Menaka v Lum Kum Chum [1977] 1 MLJ 91, PC (refd)

OCBC Bank (M) Berhad v Eden Enterprises (M) Berhad [2002] MLJU 45; [2002] 6 CLJ 437, HC (refd)

Orix Credit Malaysia Sdn Bhd v Mohd Ikbal Ismail & Anor [2010] 1 LNS 1942, HC (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)

Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513; [2000] 1 CLJ 346, CA (refd)

Rugber Kaur a/p Ajaib Singh v Ho Shee Fun & Anor [2011] 2 PIR [26], CA (refd)

Subramaniam v Retnam [1966] 1 MLJ 172 (refd)

Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129, FC (refd)

UMW Industries (1985) Sdn Bhd v Kamaruddin Abdullah & Anor [1989] 2 CLJ Rep 619, HC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 2, 2(1), 4, 4(1), 6(4), 25(1), 103(1)

Business Registration Act 1956

Companies Act 1965

Contracts Act 1950 ss 66, 75

Financial Services Act 2013

Hire-Purchase Act 1967 ss 1(2), 2(1), First Schedule

Moneylenders Act 1951 s 17A

Moneylenders (Control & Licensing) Regulations 2003

Rules of Court 2012 O 18 r 11
Sale of Goods Act 1957

Zairin bt Zainal Abidin (Yong Ee Yam with her) (Chee Siah Le Kee) for the appellant.
Mohd Ashri bin Rais (Mohd Ashri Rais & Co) for the respondents.

Mohd Nazlan JC:

INTRODUCTION

[1] This is an appeal against the decision of the sessions court which had after a full trial dismissed the claim by the appellant (the plaintiff in the proceedings at the court below) for balance of payment said to be due from the first, second and third respondents under a hire purchase agreement.

[2] This judgment touches on an analysis of the legal nature of a hire purchase, discusses its relationship with lending, and clarifies its relevance to the defined term of 'finance company business' under the now-repealed Banking and Financial Institutions Act 1989 ('the BAFIA').

KEY BACKGROUND FACTS

[3] The appellant is a company incorporated under Companies Act 1965, and is principally involved in the business of licensed money lending, hire purchase and equipment leasing. The respondents are partners in a business registered as Nur Enterprise under the Business Registration Act 1956 which activities include lorry transportation, rental of supply contract and wholesaler of construction materials.

[4] Pursuant to an offer made by the appellant as stated in a letter of offer dated 3 August 2012 (which was accepted by the respondents in writing), and a separate letter of authorisation by the respondents to the appellant dated 14 August 2012 expressly confirming acceptance of the offer, the appellant extended a hire purchase facility to the respondents for the amount of RM170,000 in respect of the purchase of one unit of Rebuild Hino Tipping Truck ('the said vehicle'). The respondents had also signed another letter dated 14 August 2012 in favour of the appellant confirming their agreement to pay the outstanding amount under the hire purchase facility between the appellant and the respondents should the appellant lose ownership of the said vehicle. The respondents then made an initial payment of RM80,000 to Hong Seng Assembly Sdn Bhd, being the seller of the said vehicle who on 26 December 2012 issued not only a receipt to the respondents for the said payment but also an invoice to the appellant for the purchase of the said vehicle. The appellant then made the requisite payment of RM170,000 to Hong Seng Assembly Sdn

Bhd to complete the purchase from Hong Seng Assembly Sdn Bhd of the said vehicle at the total purchase price of RM250,000, with the initial part payment RM80,000 having been made by the respondents.

[5] On 19 January 2013 the appellant and the respondents executed a hire purchase agreement in respect of the said vehicle. Quite apart from other fairly standard conditions embodied therein, some of which I shall allude to later, the key financing term is that the respondents entered into a hire purchase agreement for the amount of RM272,185 to be paid by way of an initial payment of RM80,000 and the remainder in 36 monthly rental installments.

[6] The payment obligation of the respondents under the hire purchase agreement was further guaranteed pursuant to a guarantee agreement dated 19 January 2013 by Sim Ying and Ng Kok Kee who are the fourth and fifth defendants at the trial before the sessions court.

[7] The said vehicle was delivered to the respondents who duly acknowledged acceptance thereof. On 20 May 2013, the first respondent was notified that the said vehicle was missing from the store. Following therefrom, and coupled with the respondents' failure to pay monthly repayments, the appellant decided to terminate the hire purchase agreement, and filed the writ action in the sessions court for the entire outstanding amount of RM168,787.48 as at 23 October 2013.

[8] The key findings of the sessions court in dismissing the claim of the appellant are as follows:

(a) the high-purchase agreement is not valid, is void and unenforceable since the appellant, being a company carrying on hire purchase business does not hold the requisite license as a 'finance company business' under s 4 of the BAFIA;

(b) being a hire purchase facility, the hire purchase agreement should have adhered to but failed to comply with the requirements of the Hire-Purchase Act 1967 ('the HP Act');

(c) nor does the appellant hold the requisite license to lend money to the respondents in accordance with the provisions of the Moneylenders Act 1951 ('the ML Act') and the procedures stipulated in Peraturan-Peraturan Pemberi Pinjam Wang (Kawalan dan Perlesenan) 2003;

(d) the monthly rate of interest at 2% (and 24% annually) violates BAFIA since interest was established without the approval of the Minister of Finance; and

(e) the respondent were not the parties responsible for the said hire purchase transaction and nor was it shown that the appellant had lent the amount of RM170,000 to the respondents or that the respondents paid RM80,000 as initial payment to the appellant.

[9] Hence, this appeal before me.

PRINCIPLES GOVERNING APPELLATE FUNCTION

[10] In hearing this appeal, I am reminded of the true role and function of this court as established by case law authorities and have therefore proceeded approaching the same accordingly. In particular I refer to the decision of the Court of Appeal in the case of *Rugber Kaur a/p Ajaib Singh v Ho Shee Fun & Anor* [2011] 2 PIR [26] where it was stated as follows:

> It is the duty of an appeal court, if satisfied or convinced that the trial judge had acted upon principles of law that were wrong, had misapprehended the facts or had made a wholly erroneous conclusion, to reverse the decision (*Tan Kuan Yau v Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ Rep 323; *Rasidin b Partorjo v Frederick Kiai* [1976] 1 LNS 123). Lindley MR in *Coghlan v Cumberland* [1898] 1 Ch D 704 had occasion to say:
>
> > Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appeal from, but carefully weighing and considering it; and not shirking from overruling it if on a full consideration the court comes to the conclusion that the judgment is wrong.

Similarly in another Court of Appeal case of *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, the principles of appellate intervention are further reiterated in the following fashion:

> Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an injustice is demonstrated to have been occasioned by any error by the trial judge, for example:
>
> (a) the judgment is based upon a wrong premise of fact or of law;
>
> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
>
> (c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion; an appellate court will intervene to rectify that error so that injustice is not occasioned.

EVALUATION OF THE GROUNDS OF APPEAL

[11] The principal grounds of appeal as highlighted in the appellant's amended memorandum of appeal, the contentions of both appellant and the respondents, as well as the assessment and findings of this court are set out hereunder.

Issue 1: 'Finance Company Business' license under Banking & Financial Institutions Act 1989 ('the BAFIA')

[12] The sessions court held that the hire purchase agreement is not valid, primarily on account of the trial judge's key findings that despite purporting to extend hire purchase facility, the appellant not only failed to comply with the Hire-Purchase Act 1967 but also does not hold a 'finance company business' license in contravention of s 4 of the BAFIA.

[13] The appellant argued that the hire purchase agreement in question does not fall within the ambit of the Hire-Purchase Act 1967 and neither is the appellant a financial institution or finance company that would have necessitated it to apply for the requisite license under BAFIA.

[14] The respondents on the other hand, submitted that the sessions court had correctly found for the respondents including after having reviewed a couple of case law authorities in arriving at such finding, specifically *OCBC Bank (M) Berhad v Eden Enterprises (M) Berhad* [2002] MLJU 45; [2002] 6 CLJ 437 and *Gemilang Mirza Sdn Bhd & Ors v Public Prosecutor* [2014] 11 MLJ 300; [2013] 9 CLJ 214.

[15] It is imperative that the correct interpretation to be ascribed to provisions in BAFIA relevant to this appeal be properly appreciated. The pertinent statutory provisions are as follows:

(i) Section 2(1)
'banking business' means —

(a) the business of — (i) receiving deposits on current account, deposit account, savings account or other similar account; (ii) paying or collecting cheques drawn by or paid in by customers; and (iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe;

'finance company' means a person which carries on finance company business;

'finance company business' means —

(a) the business of receiving deposits on deposit account, savings account or other similar account; and

(b)(i) giving of credit facilities;

(ii) leasing business;

(iii) business of hire purchase, including that which is subject to the Hire-Purchase Act 1967; or

(iv) business of acquiring rights and interests in a hire purchase, leasing or other similar transaction.

(c) such other business as the Bank, with the approval of the Minister, may prescribe;

(ii) Section 4

(1) No person shall carry on —

(a) banking, finance company, merchant banking, or discount house business, unless it is a public company; or

(b) money-broking business, unless it is a corporation, and holds a valid licence granted under section 6(4) to carry on such business.

(iii) Section 6

(1) The Bank shall, on an application having been duly made in accordance with section 5 and after being provided with all such information and documents as it may require under that section, consider the application, and where it is satisfied that the criteria set out in the Second Schedule are fulfilled with respect to the applicant, make a recommendation to the Minister whether the licence should be granted or refused and the conditions, if any, to be imposed on the licence.

(2) In making a recommendation whether the Minister should grant or refuse a licence, the Bank may take into account any matters relating —

(a) to any person who is or will be employed by, or associated with, the applicant for the purpose of the applicant's business; and

(b) to any related or associate corporation or to any director or controller of any such corporation.

(3) A recommendation to grant a licence shall not be made if the Bank is satisfied that it would be contrary to any other provision of this Act to grant the licence, or that it would be detrimental to the soundness of the financial structure of Malaysia to do so.

(4) Upon receiving an application and the recommendation of the Bank under this section, the Minister may grant the licence, with or without conditions, or refuse the license.

[16] It is therefore clear from the above that only a public company can carry on finance company business and provided it is granted the license to undertake such business. It is equally not in dispute that the appellant is neither a public company nor has it been granted a finance company business license under BAFIA. The question therefore is whether the appellant is required under the law to be in possession of the finance company business license. The answer is decidedly dependent on whether the appellant is carrying on a finance company business. It should be highlighted at this juncture that the issue is not simply one whether the appellant holds a valid license or otherwise. In order to ensure the continued well-functioning and integrity of the financial system and infrastructure in the country, as well as adequate protection to depositors, the legislative scheme of BAFIA required the performance of specified business activities to be regulated by way of a licensing regime, the non-compliance with which would constitute a criminal offence punishable under s 103(1) of the same Act. A similar approach, albeit more supervisory and refined in its contents can be found in the omnibus Financial Services Act 2013 which introduces the concept of 'authorised business' which is defined to be either a licensed business or an approved business.

[17] In my view, there can be no dispute that a finance company license is only required if the appellant carries on finance company business. According to s 2(1) set above, finance company business must involve the activity of deposit taking and one other business activity such as extending hire purchase facilities. Since the appellant does not undertake the business of receiving deposits, it is patently obvious that a license to carry on finance company business under s 4(1) is wholly unnecessary. A crucial point to note is that the provisions in s 2(1) defining 'finance company business' incorporate the word 'and' which manifestly acts as a conjunction that connects limb (a) and any one item in limb (b) which are therefore to be taken jointly in the interpretative process concerning the said definition of 'finance company business'.

[18] Indeed, in the case of *Light Style Sdn Bhd v KFH Ijarah House (M) Sdn Bhd* [2009] 4 MLJ 575; [2009] 3 CLJ 370, the High Court interpreted the various limbs relevant to the definition of 'banking business' in the same s 2(1) of the BAFIA (also referred to above) similarly conjunctively given the presence

of the word 'and', and even observed the construction that ought to be given to the definition of 'finance company business', which is entirely consistent with my finding herein. The following relevant passages from the judgment of Rohana J (as Her Ladyship then was) are of direct relevance and most instructive:

> From the above definition, a person is carrying out Banking Business only if he is in the business of receiving deposits, paying and collecting cheques drawn by customer and providing financing or such other business prescribed by the Minister. Thus, Banking Business entails the acts of all these three transactions and not just any one of them. From the wordings of s 2 all the three limbs must be read conjunctively and cannot be read disjunctively as suggested by En PS Gill. Therefore, if a person is providing only one of the businesses under the three limbs in s 2, say merely providing financing as in this case, but not collecting deposit, such activity would not be sufficient to constitute Banking Business under this definition. It follows that, even if it is true that the defendant is providing financing in the Murabaha Sale Agreement, the provision of financing *per se* by the defendant is not a Banking Business and requires no license under s 6(4) of the BAFIA. Section 6(4) requires licensing only if a person is carrying out, banking business, finance company business, merchant banking business or discount house business. All these businesses are clearly defined in s 2 of the BAFIA.
>
> *It is to be noted that even the definition of 'finance company business' in s2 entails receiving of deposit and provision of credit, leasing, hire purchase or acquiring rights and interest in hire purchase. In my view there is therefore no basis to say that the defendant has contravened any of the provisions in BAFIA in the transaction with the plaintiff.*
>
> ...
>
> In today's legislation of most jurisdictions, the term, Banking Business has been given statutory definition. Prior to that, in an old English decision, Lord Denning MR, described Banking Business in the case of *United Dominions Trust Ltd v Kirkwood* [1996] 1 All ER 968 by taking into account historical analysis back to eighteenth country. Thus in that case (at p 975) he found that, there are two characteristics found in bankers. First, they accept money from, and collect cheques for their customers and place them to their credit. Secondly, they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. He further states these two characteristics carry a third one that is they (banks) keep current accounts or something like that nature in their books where credits and debits are entered. This position is reinforced in *Paget's Law of Banking* (6th Ed at p8). The Australian court also defines Banking Business in the same way. In *PP Consultants Pty Ltd v Finance Sector Union* [2000] HCA 59 the High Court of Australia in defining Banking Business observed as follows:
>
> > The essential characteristics of the business of banking are 'the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected by lending it again in such sums as are required'. It involves the creation of distinct debtor and creditor relationships between the bank and those who deposit money with

it and also, between the bank and those who borrow from it.

(Emphasis added.)

[19] In my view, reliance by the respondents on the case of *OCBC Bank (M) Berhad v Eden Enterprises (M) Berhad* [2002] MLJU 45; [2002] 6 CLJ 437, and referred to by the sessions court judge in her grounds of decision is misconceived and not sustainable. The High Court in that case refused summary judgment application by the plaintiff (OCBC Malaysia) as among others, and in spite of the presence of a vesting order, the question of whether OCBC Singapore, the entity which actually provided the credit facility was in fact licensed under BAFIA to carry on banking business was ruled to be a triable issue deserving of a full trial. It is true, as set out by the learned sessions court judge in her grounds of decision that *OCBC Bank (M) Bhd v Eden Enterprise* stated that a license is an imperative necessity for one who undertakes banking business under BAFIA. But this is already so manifestly set out in s 4(1) itself and does not in any meaningful way (if at all) address the more fundamental issue of whether one actually carries on finance company business under the law nor touch on the construction of the words 'finance company business' in the first place.

[20] Similarly, the case of *Gemilang Mirza Sdn Bhd & Ors v Public Prosecutor* [2014] 11 MLJ 300; [2013] 9 CLJ 214 does little to advance the contention of the respondents. The grounds of decision prepared by the learned sessions court judge state that based on this case, it is for the accused to prove that its deposit-taking activities did not fall within the ambit of the definition of 'deposit' in s 2(1) of the BAFIA that would otherwise have necessitated the holding of a license under s 6(4) of the same Act; and that accordingly, it would be for the appellant in the instant case to prove that it is validly licensed under BAFIA.

[21] *Gemilang Mirza* has no relevance to the instant case. It is a criminal case in respect of a contravention of s 25(1) of the BAFIA which provides as follows:

Section 25

(1) No person shall receive, take, or accept deposits except under and in accordance with a valid licence granted under section 6(4) to carry on banking, finance company, merchant banking or discount house business.

(2) The provisions of subsection (1) shall have full force and effect notwithstanding anything contained in any other written law, and, in particular, notwithstanding anything contained in the Companies Act 1965 in respect of borrowing corporations as defined in section 4 of that Act.

(3) For the purposes of this section, the definition of 'deposit' in section 2 is modified by — (a) substituting for the words 'received or paid', the words 'or any precious metal, or any precious stone, or any article which is comprised, in part or in whole, of any precious metal or precious stone, and any other article or thing as may be prescribed by the Minister, on the recommendation of the Bank, received, paid or delivered'; (b) by inserting after the words 'repaid', 'repayable', 'repayment' and 'payment' the words 'or returned', 'or returnable', 'or return', and 'or delivery', respectively.

[22] The High Court in that case ruled that upon the prosecution proving the element of deposit-taking it would be on the accused to show if the activities in question fell within the relevant exception, such as being bona fide payment within the exclusion found in the definition of deposit set out in s 2(1) of the BAFIA. The High Court however went on to state that it would be unnecessary for the prosecution to prove that the accused did not possess a valid license because it is for the accused 'to prove that they had a valid license granted under s 6(4) of the BAFIA'. Although I have my reservations concerning this point since it is trite that it is for the prosecution to prove all the ingredients of an offence, and that as can be readily seen from the aforesaid provisions of s 25(1), the key ingredient of 'except in accordance with a valid license granted under s 6(4)' must therefore be similarly proven by the prosecution. But at any rate, the point is of no relevance to the case of the respondents. The appellant does not dispute it does not hold a license under BAFIA. Its central argument is quite simply that it does not under the law need to be so licensed because it plainly does not carry on any banking or finance company business that could otherwise compel the holding of the requisite license.

[23] Accordingly on this ground, it is my finding that a proper interpretation of 'finance company business' which I believe is also in accord with the understanding of the industry, refers to the business of not only receiving deposits on deposit account, savings account or other similar accounts specified in limb (a) but also undertaking at least any one of the four other activities set out in limb (b)(i), (ii), (iii) or (iv) of the same s 2(1) of the BAFIA defining 'finance company business'. Since, in the instant case, the appellant does not operate any deposit-taking business (as per limb (a)) it cannot under BAFIA be said to be carrying on finance company business, regardless of whether or not it is running a hire purchase business under limb (b)(iii). There is thus no necessity for the appellant to hold a license under s 4 and that BAFIA does not regulate the business of the appellant. The finding of the sessions court that the appellant's failure to hold a finance company business license under BAFIA renders the hire purchase agreement to be not valid, void and unenforceable is therefore manifestly erroneous and ought to be reversed. However, for clarity, the appellant's branch manager ('SP1')'s evidence at trial that the appellant does not need to possess the said BAFIA license because it can lawfully carry on

its business in pursuance of its memorandum and activities of association and the Companies Act 1965 is not entirely accurate. The complete answer to the question why the said license is not necessary is that the appellant's business does not fall within the definition of any of the businesses, specifically in this case, 'finance company business' under BAFIA that would otherwise compel the application for and the holding of the relevant license.

Issue 2: Is the hire purchase agreement subject to Hire-Purchase Act 1967 ('the HP Act')

[24] The sessions court had ruled, correctly, that the transaction in question between the appellant and the respondents is in the nature of a hire purchase. However, it also held that as a result, being a company carrying on hire purchase business, the appellant must ensure that its hire purchase transactions are performed subject to the provisions of the HP Act. It is important that it be clearly stated that this is an incorrect proposition of law. It is clear and settled law that the jurisdictional reach of the HP Act does not extend to all hire purchase transactions. The HP Act is only applicable to hire purchase agreements in relation to goods specified in the First Schedule to the HP Act (which may even be amended by the relevant Minister from time to time). Transactions falling outside the ambit of or not specified in the First Schedule to the HP Act thus continue to be governed by the general law, principally particularly the Contracts Act 1950 and the common law.

[25] It is imperative that given its significant relevance, the items of goods presently listed in the First Schedule to the HP Act be set out hereunder:

Hire-Purchase Act

First schedule

(Section 1)

LIST OF GOODS

1. All consumer goods;
2. Motor vehicles, namely —
   - (a) Invalid carriages;
   - (b) Motor Cycles;
   - (c) Motor Cars including taxi cabs and hire cars;
   - (d) Goods Vehicles (where the maximum permissible laden weight does not exceed 2540 kilograms);
   - (e) Buses, including stage buses.

[26] I am in agreement with the submission of the counsel for the appellant that since the maximum permissible laden weight to bring the vehicles within the First Schedule to the HP Act is 2540kg, the considerably much greater weight of the said vehicle at 27000kg (as per the registration card for the said vehicle) clearly renders the HP Act inapplicable. The following passages from the decision of the High Court in *Lee Cheng Ting T/A Perniagaan Jia Zing Ten v MBf Finance Bhd* [2005] 6 CLJ 479 specific to this issue are instructive:

> In my judgment, this issue may be resolved by determining whether the vehicle is subject to the Act. The certificate of registration shows clearly that the vehicle is a goods vehicle whose maximum permissible laden weight is 4500kg, and hence exceed the threshold of 2540 kg and so is outside the ambit of item 2(d) of the First Schedule to the Act, in which case the provisions of the Act would not apply. Section 1 thereof provides that the Act shall apply in respect only of hire purchase agreements relating to goods specified in the First Schedule (see also MBf *Finance Bhd v Ting Kah Kuong,* per Abdul Kadir Sulaiman J (now JCA).
>
> In *MBf Finance Bhd v Sim Peng Bee,* I held, inter alia, that s 2(1) of the Act applies to agreements within its ambit but does not prohibit hire purchase agreements outside its ambit eg, where the plaintiff has given unrebutted evidence that the heavy vehicle in the agreement was not subject to the Act, to which both learned counsel had agreed.

[27] Similarly, in an earlier case of *MBf Finance Bhd (formerly Known As Malaysia Borneo Finance Corporation (M) Bhd) v Ting Kah Kuong & Anor* [1993] 3 MLJ 73 the High Court ruled no less clearly as follows:

> a forklift was not a motor vehicle and therefore the hire purchase agreement was not subject to the Hire-Purchase Act 1967. It therefore follows that the agreement was not subject to the Act as the goods were not goods as specified in the First Schedule to the Act to resist the defence that the agreement was void and unenforceable owing to various non-compliances with the provisions of the Act.

[28] It is therefore unfortunate that the submission of the appellant on this point, pivotal as it is on the crucial question of the very applicability of HP Act to the hire purchase agreement in contention was not dealt with by the sessions court and not referred to in the grounds of the decision of the learned sessions court judge. Section 1(2) of the the HP Act itself crystal-clearly stated that the act applies 'in respect only of hire purchase agreements relating to goods specified in the First Schedule'.

[29] The law is equally clear on the position of hire purchase transactions which are not covered under the First Schedule to the HP Act. As referred to earlier, such transactions would be governed by common law principles as well as provisions of the Contracts Act 1950. There are no provisions in the HP Act which seek to invalidate let alone criminalise hire purchase transactions which are subsisting outside the legislative remit of the HP Act. Indeed there cannot

be any for the simple reason that the HP Act, by virtue of its First Schedule does not extend to all hire purchase transactions in the first place and indeed, as emphasised in s 1(2) itself. It should be noted that even the definition of 'finance company business' in s 2 of the BAFIA as referred to earlier, in limb (b)(iii) states 'the business of hire purchase, including that which is subject to the Hire Purchase Act 1967', thus demonstrating that the HP Act is not an exclusive piece of legislation which governs all hire purchase transaction in the country. It is of some interest to note that the term 'finance company business' is not featured in the Financial Services Act 2013 ('the FSA'). The FSA sets out that the definition of 'banking business' includes (as well as 'investment banking business' for that matter) as one of its prerequisites the presence of the activity of the 'provision of finance', which in turn is defined to include leasing business. The definition of 'leasing business' expressly excludes hire purchase subject to the HP Act. As such, whilst transactions under the HP Act are now outside the scope of the successor to BAFIA, those not subject to the HP Act many potentially compel the person undertaking such business to be licensed if his business operations comes within the definition of either 'banking business' or 'investment banking business' under the FSA where in both cases the licensing requirement would however only be applicable if other business activities stated in the respective definitions (to state only one example, the business of accepting deposits on deposit accounts) are also being performed by such person.

[30] The Court of Appeal decision in *MBf Finance Bhd v Low Ping Ming t/a Low Peng Enterprise* [2005] 3 MLJ 208; [2005] 1 CLJ 305 deals with the point on the validity of hire purchase not subject to the HP Act with the requisite clarity in the following manner:

> The critical issue for determination is whether there can still be valid hire purchase transactions in respect of goods not in the First Schedule to the Act. The answer is provided by s 3(1)(a) of the Civil Law Act 1956 which enunciates that the court shall apply the common law of England and the rules of equity as administered in England on 7 April 1956 'Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia ...' The common law of England cannot therefore be applied in respect of goods specified in the First Schedule to the Act as provision has been made in respect of them. In the case of goods not in the First Schedule to the Act it only means that no provision has been made by any written law with regard to them. The common law will therefore continue to be applied to such goods. It follows that there can be valid hire purchase agreements in respect of goods not in the First Schedule to the Act. It would be appropriate for the parties to set out the terms and conditions governing the transaction in such hire purchase agreements. This may include even relevant provisions from the Act itself. It is not possible for them to agree to be bound by the Act as it, inter alia, regulates the rights and duties of the parties and provides for penal sanctions for non-compliance. In this regard reference is made to *London County Council v Aylesbury Dairy & Co* [1898] 1 QB 106 where Wright J said at p 109:

> Where an enactment may entail penal consequences no violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.
>
> Thus even though the agreement does not fall within the ambit of the Act and is also not a bill of sale it is a valid hire purchase agreement under the common law. The repossession of the vehicle was done by the appellants in accordance with the terms of the agreement and is lawful.

[31] An earlier High Court decision in *Kesang Leasing Sdn Bhd v Mohd Yusof bin Ismail & Anor* [1990] 1 MLJ 291 had similarly ruled that the HP Act does not exclude the application of the provisions of the Act to hire purchase agreements in respect of goods not specified in the First Schedule if the parties to the agreement agree to be bound by the provisions of the act, but not if otherwise.

[32] As such, as more than amply demonstrated by case law authorities, the finding by the learned sessions court judge that the hire purchase agreement in the instant case to be not valid, void and unenforceable because the same did not comply with the requirements of the HP Act is plainly unsustainable.

Issue 3: Is the Moneylenders Act 1951 applicable to the hire purchase agreement

[33] Having determined that the relevant transaction between the appellant and the respondents to be in the nature of a hire purchase, the learned sessions court judge also held that the appellant, as the plaintiff in the court below had in any event failed to prove that the appellant had lent the RM170,000 to the respondents or establish that the lending was effected in accordance with the requirements of the Moneylenders Act 1951 and the Moneylenders (Control & Licensing) Regulations 2003 ('the Regulations'), particularly concerning the failure to follow the applicable prescribed format.

[34] As a result, the hire purchase agreement was also found by the sessions court to be void and unenforceable by reason of the said non-compliance with the Moneylenders Act 1951 and the Regulations.

[35] It is imperative that the basic position in law, elementary as it may seem, be stated for better clarity. The term 'hire purchase agreement' is defined in s 2(1) of the the HP Act as follows:

> 'hire purchase agreement' includes a letting of goods with an option to purchase and an agreement for the purchase of goods by installments (whether the agreement describes the installments as rent or hire or otherwise), but does not include any agreement

A

(a) whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before delivery of the goods; or

(b) under which the person by whom the goods are being hired or purchased is a person who is engaged in the trade or business of selling goods of the same nature or description as the goods comprised in the agreement

B

[36] Hire purchase is thus a type of contract of purchase where the financier or owner lets the goods or assets to the hirer or buyer for an agreed period in return for installment payments. The former continues to own the asset until
C the latter makes the final payment, and retains the right to repossess on any breach by the hirer despite possession being given to the hirer (see *Credit Corporation (M) Bhd v The Malaysian Industrial Finance Corp & Anor* [1976] 1 MLJ 83 and *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129). If the property in the asset passes at the time of the
D execution of agreement or upon its delivery, the transaction would fall instead under the Sale of Goods Act 1957 and is a credit sale. Thus in a loan situation the purchaser borrows, pays for the asset and owns it immediately.

[37] The following passage from the case of *Low Ping Ming v MBf Finance*
E *Bhd* [2000] 2 CLJ 307 further clarifies the nature of hire purchase:

> At the outset, it is necessary to restate the relevant principles relating to a hire purchase agreement. A hire purchase agreement, at common law, is regarded as a form of contract whereby the owner lets goods out on hire and agrees that the hirer
F may either return the goods and terminate the contract or elect to buy the goods on the completion of the required periodic payments. A common characteristic or feature of such an agreement is that the hirer has the option of purchasing the goods. And throughout the period of hire purchase, title to the goods remains with the owner. Therefore, unlike a sale of goods, no title to the goods passes from the owner to the hirer during the period of hire. It is common practice nowadays for a finance
G company to be involved in a hire purchase transaction as owner. For example, the finance company buys the goods from the dealer who is paid the price and the finance company then steps into the dealer's shoes and becomes the owner for the purpose of the hire purchase agreement. In this way, the finance company becomes the owner as well as financier.

H

[38] The aforesaid extract also highlights that a hire purchase transaction invariably involves three parties, namely the dealer (seller), the hirer (purchaser) and the financier (owner). This translates into two distinct contractual relationships; one between the dealer and the financier and the
I other, the latter and the hirer which constitutes the hire purchase agreement.

[39] The ruling of the sessions court which appears to equate hire purchase to a lending transaction is plainly an irreconcilable contradiction, conceptually flawed and legally unsound. The Court of Appeal in *Ambank (M) Bhd v KT*

Steel Sdn Bhd & Ors [2011] 5 CLJ 500 stated the point of distinction between hire purchase and loan transaction most instructively and with great clarity in the following manner:

> But the issue arises because the law provided for a distinction between a hire purchase transaction and a loan transaction. In an equipment leasing, even though the hirer chooses the equipment, the equipment is sold to the 'financier', who purchases the equipment and causes it to be delivered to the hirer for monthly lease payments. See *Malayan Credit Ltd v Mohamed Kassim* [1965] 2 MLJ 134; [1965] 1 LNS 111. It is recognised as not a financing transaction. On the other hand, a loan transaction is a money-lending transaction and is specifically regulated by legislation to require licensing, and without a license, the loan transaction is illegal null and void. Hence, in order to determine the true nature of the transaction rather than merely to see what the parties sought to make it appear to be, it is essential that the facts as a whole should be considered.

[40] As such, the transaction arising from the hire purchase agreement between the appellant and the respondents cannot be characterised as other than a hire purchase facility pure and simple, and any assertion that it is a loan transaction is a patent misapprehension of the law, for the Moneylenders Act 1951 and the Regulations made thereunder are wholly inapplicable to the instant case. The issue of non-compliance with the Moneylenders Act 1951 therefore does not arise and is absolutely of no consequence. It is not inaccurate to assert that the appellant did provide some form of 'financing' to the respondents in the sense of making available for hire the said vehicle to the respondents for which the appellant first had to purchase from the dealer. But this, coupled with the obligation on the part of the respondents to make monthly installments to the appellant do not make the arrangement a loan transaction, even if it could appear as a financing taken to purchase a vehicle. It is instead a hire purchase transaction, the key aspect being the hiring of the said vehicle, which the hirer can elect to purchase (or not to) upon settlement of all installments, but before which point in time, the property in the said vehicle must steadfastly remain with the appellant.

Issue 4: Whether the respondents should not be held responsible and there is no proof of payment of RM170,000 made to them

[41] It is not in dispute that the respondents entered into the hire purchase agreement with the appellant. The said vehicle was hired by the respondents pursuant to the same and the vehicle delivery order (exh P17, p 217 of the appeal record) confirmed acceptance by the respondents of the delivery of the said vehicle. Apart from the payment terms as referred to earlier, the hire purchase agreement also embodies other standard provisions usually found in other hire purchase agreements. These include the right of the appellant to terminate the hire purchase agreement and repossess the said vehicle in the event of any breach by the respondents; including breach of the term

concerning non-payment of any one installment payment. Further, the appellant is also entitled to claim for all outstanding amount inclusive of costs and interest due from the respondents should the said vehicle not be returned to the appellant following termination of the hire purchase agreement.

[42] Since the transaction is one involving a hire purchase, no loan or any payment was extended to the respondents. In order to enable the appellant to extend to hire purchase facility, the appellant must first acquire the said vehicle. The invoice dated 26 December 2012 (exh P11, p 195 of the appeal record) evidenced the purchase of the said vehicle by the appellant from Hong Seng Assembly Sdn Bhd, at the purchase price or RM250,000. It was further acknowledged on the said invoice that the net amount of RM170,000 had been received 'PAID' on 19 January 2013. The invoice states the net amount being RM170,000 after deducting the down-payment of RM80,000. Even more clearly, the official receipt dated 26 December 2012 (exh P10, p 194 of the appeal record) for the payment of the RM80,000 states the said amount was for down-payment for the said vehicle and received from Nur Enterprise (being the firm of the respondents). This is entirely consistent with letter of undertaking prior in time by the appellant to Hong Seng Assembly Sdn Bhd dated 11 January 2013 to purchase the said vehicle and pay the balance of RM170,000 upon the respondents' (referred to as the appellant's customer and hirer under the hire purchase facility) acceptance of delivery of the said vehicle. The RM80,000 is also referred to in this letter of undertaking as having been paid by the respondents to Hong Seng Assembly Sdn Bhd on behalf of the appellant. Item 7 of the Schedule to the hire purchase agreement too states RM80,000 as being part of the hire purchase price and the testimony of the administrative clerk of Hong Seng Assembly Sdn Bhd, as SP3 who signed the official receipt for the RM80,000 leaves little doubt that the amount of RM80,000 was intended for the purpose as stated and payment was indeed made by the respondents. In any event, I agree with the contention of the appellant that even if despite the documentary evidence and testimony of SP3, payment of RM80,000 was in fact made by a third party, it must surely have been done on behalf of or for the benefit of the respondents. Any such arrangement, should one exist, would have been entirely between the respondents and such third party.

[43] The learned sessions court judge in her grounds of decision found, based on the testimony of the first respondent that all dealings with the appellant had been done by the fourth defendant without the knowledge of the first respondent, and that the appellant had already obtained judgment or default against the fourth and fifth defendants. It was thus reasoned that the respondents ought not to be made responsible for the said transaction.

[44] I find it difficult to justify support for such finding in the face of overwhelming evidence to the contrary. As mentioned earlier, the respondents, either the first respondent singly, representing Nur Enterprise, or all three respondents as partners of the business collectively, provided their signatures to the offer letter, the hire purchase agreement and the vehicle delivery order. A police report was also lodged by the first respondent on the loss of the said vehicle as was a letter written to the relevant insurance company by the first respondent for the same purpose. Further, the fact that judgment in default had been entered against the fourth and fifth defendants, being guarantors for the said hire purchase surely cannot be a valid justification under the law to preclude the right of the appellant to enforce its contractual right of recovery against the respondents under the hire purchase agreement executed by the respondents.

[45] As such, as the hirers of the said vehicle under the hire purchase agreement, and in light of the incontrovertible evidence, especially the clear written documentary support, it is an inescapable conclusion that the respondents are clearly responsible to make good their shortcomings in accordance with the agreed terms of the hire purchase agreement. Any other conclusion would run contrary to the fundamental, much exalted and time-honoured principle of the sanctity of contract. The finding that the respondents are not responsible is therefore not tenable. Any private arrangement between the respondents and the two guarantors (the fourth and fifth defendants in the trial at the court below), if it existed in the first place, is neither evident to any other party, including the appellant nor in any manner reflected in the various documentation relevant to the hire purchase agreement between the appellant and the respondents, and at any rate entirely irrelevant to the issue of dispute between the contracting parties to the hire purchase agreement.

[46] I should, for completeness, add that the argument that the respondents had not been in the know of the transactions and that the first respondent having merely signed blank forms and did not understand English, and thus ought not to be responsible for the same is not only unsupported with evidence, but also not justified under the law. It is well-established in the law of contract that a person who is a party to a written contract is bound by the terms of the contract whether or not he understands the language in which it is documented, in the absence of fraud or misrepresentation (see *Subramaniam v Retnam* [1966] 1 MLJ 172). No allegation of fraud or misrepresentation had been raised, let alone evidenced in the instant case. In the case of *UMW Industries (1985) Sdn Bhd v Kamaruddin Abdullah & Anor* [1989] 2 CLJ Rep 619, the High Court observed pointedly that:

> As for the second defendant's contention that he only signed blank guarantee forms, he has only himself to blame as the plea of non est factum does not work in favour of a person who has shown himself to be negligent.

The law cannot thus permit the respondents to be excused from the performance of their expressly stated promise as contained in a valid written agreement on the basis of this contention. The following passage from the case of *Imbangan Utama Sdn Bhd v Lotan Engineering Works Sdn Bhd* [2002] 2 MLJ 313; [2002] 8 CLJ 497 is no less instructive:

> It really takes a litigant of unusual temerity or cheerful insouciance to register a plea of *non est factum*, for such plea rarely if ever succeeds. There is a whole pack of legal cards stacked against such plea. As a defence or a cause of action the onus rests heavily and onerously on the party who alleges *non est factum*. The signer must establish his lack of competence due to illness or innate incapacity or defective education and he was not negligent or had acted nonchalantly or with want of care (see *Saunders v Anglia Building Society* [1971] AC 1004 (HL). And, he must further establish that he had thought that he was signing a document which was so radically or fundamentally or basically or essentially different in substance or in kind from the document signed (see also *Polygram Records Sdn Bhd v Hillary Ang & Ors* [1994] 3 CLJ 806 and *Goh Jong Cheng v MB Melwani Pte Ltd* [1991] 1 MLJ 482; [1990] 1 LNS 160).

Issue 5: Whether the appellant is entitled to interest at 2% per month

[47] The learned session court judge had ruled that the appellant has no entitlement to the said interest at 2% monthly (and 24% annually) because this was imposed by the appellant without the consent of the Minister of Finance in contravention of BAFIA. However, I should point out that no such provision exists in BAFIA. In any event, even if the learned session court judge had actually meant violation of the Moneylenders Act 1951 for the failure of the appellant to comply with s 17A of the Moneylenders Act 1951 (or obtain any exemption pursuant thereto), this finding would still be unsustainable in law. Section 17A of the Moneylenders Act 1951 provides as follows:

> Interest for secured and unsecured loans
>
> 17A
>
> (1) *For the purposes of this Act, the interest for a secured loan shall not exceed twelve per centum per annum and the interest for an unsecured loan shall not exceed eighteen per centum per annum.*
>
> (2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a moneylender of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.
>
> (3) Where in a moneylending agreement the interest charged for a secured

loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.

(4) Any moneylender who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both. (Emphasis added.)

[48] This finding cannot be upheld since it has already been established that a hire purchase, like the hire purchase agreement in the instant case, is manifestly not a loan or moneylending transaction. The Moneylenders Act 1951 therefore does not apply to the hire purchase agreement entered into between the respondents and the appellant.

[49] Separately, nor can the said rate be contended to be a penalty interest and unenforceable for not being reasonable within the scope of s 75 of the Contracts Act 1950. The term 'late charges' is defined in the hire purchase agreement as follows:

'Late Charges' means interest at the rate set out in item (10) of the Schedule calculated on daily basis and payable both before and after judgment, on any sums payable by the Hirer under this Agreement and which may from time to time be overdue.

[50] Item 10 of the Schedule to the hire purchase agreement provides the 'late payment charges' to be '2% per month'. Clause 11.4 of the hire purchase agreement states the obligation to pay late charges as follows:

If for any reason whatsoever the owner is unwilling to resume possession of the goods or if for any reason whatsoever possession of the goods is not obtained by the owner within one (1) month after the date of the termination notice or possession of the goods being so obtained the goods are not sold for any reason within the above-mentioned period, the hirer shall forthwith upon the expiration of the said period pay to the owner an amount equal to aggregate of (i) the unpaid balance of the hire purchase price, (ii) accrued late charges, (iii) the costs and expenses referred to in cl 11.2 and (iv) any other sums payable under this Agreement. *All sums payable under this clause shall bear interest at the rate set out in item (10) of the Schedule from the date of demand by the owner until the date of payment*. Upon payment by the Hirer of all such sums and interest thereon the hirer shall be released of all liabilities to the owner for installments and other monies under this agreement and damages for breach of this agreement. (Emphasis added.)

[51] Therefore, as the parties have agreed that the appellant was entitled to charge late interest, it is not open for the respondents to raise an objection to the very idea which they too had agreed upon (see *HSBC Bank Malaysia Bhd (formerly known as Hong Kong Bank Malaysia Bhd) V LH Timber Products Sdn*

Bhd (formerly known as Ho Lim Sawmill Sdn Bhd) & Ors [2005] 6 MLJ 625; [2005] 8 CLJ 249). In the case of *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513; [2000] 1 CLJ 346, where the rate was 19%pa, the Court of Appeal stated relevantly as follows:

> To bring that increased or penalty interest within the ambit of s 75, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that was fixed unilaterally by the appellants, lends support to my conclusion that it could not have been that excessive to enable the respondent to agree to that rate of interest to be charged.

[52] The right to charge the contracted rate of interest being irrefutable, in view of the findings on the nature of the transaction being a hire purchase, and the non-applicability of BAFIA, Hire-Purchase Act 1967 and the Moneylenders Act 1951, as well as considering the facts and the totality of evidence in the instant case, it is also therefore equally beyond question that the appellant is therefore fully entitled to the claim of RM168,787.48 as specifically pleaded in the revised statement of claim (as at 23 October 2013). Furthermore, in any event, it is worthy of emphasis that the respondent did not attempt to challenge let alone deny this amount in their pleadings. In the absence of any denial, it must thus be assumed that the claim amount is admitted (see *Mayor Singh v Lau Geok Swee* [1960] 1 MLJ 285).

Issue 6: Applicability of restitution under s 66 of the Contracts Act

[53] Given the findings I have discussed earlier in this judgment, it is strictly unnecessary to consider this one other question; which is whether as the hire purchase agreement had been ruled by the trial judge to be void and unenforceable, the sessions court should have applied the principle of restitution in favour of the appellant pursuant to s 66 of the Contracts Act 1950. For completeness, I shall however attempt to address the point briefly. Section 66 states as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[54] In the instant case, the appellant had expended RM170,000 to acquire the said vehicle from Hong Seng Assembly Sdn Bhd. The said vehicle was delivered to the respondents who had thus enjoyed the possession and use thereof until the loss of the same, in respect of which the relevant reports were made by the first respondent but had since defaulted in the agreed installment payment. Had the hire purchase agreement been ruled by this court to be void and unenforceable (which is not the case) the advantage and form of benefit which had accrued to the respondents could have entitled the appellant to seek the application of s 66 of the Contracts Act 1950 in its favour (see *Amanah*

Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman [2014] 11 MLJ 464; [2013] 8 CLJ 516), even if, like in the instant case, the matter was not pleaded by the appellant, in keeping with the requirements of O 18 r 11 of the Rules of Court 2012, which makes it plain that a point of law need not be pleaded as the language in r 11 is permissive rather than mandatory (see *Ho Weng Leong v Ng Kee Chin* [1996] 5 MLJ 139).

[55] In the case of *Orix Credit Malaysia Sdn Bhd v Mohd Ikbal Ismail & Anor* [2010] 1 LNS 1942 a lending transaction was held to be void and unenforceable as the plaintiff did not hold the requisite license under the Moneylenders Act 1951 nor prove to have been granted any exemptions under the Act. The High Court applied s 66 of the Contracts Act 1950 in favour of the plaintiff lender and dismissed the objection of the defendant that restitution had not been pleaded by the plaintiff.

[56] Indeed restitution was ordered even when the issue of s 66 was not raised by the parties but invoked by the courts upon discovery of the invalidity of the relevant contractual documents after the commencement of court proceedings (see the Federal Court decision in *Ahmad bin Udoh & Anor v Ng Aik Chong* [1970] 1 MLJ 82 and the Privy Council decision in *Menaka v Lum Kum Chum* [1977] 1 MLJ 91). It is therefore sufficient for a pleading to contain only the facts relied upon, and need not state the legal effect of the facts. The legal result of the pleaded facts itself need not be pleaded (see also The Federal Court decision in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

CONCLUSION

[57] In view of the foregoing reasons, especially in respect of the clarity on the answers to the questions of law on the applicability or otherwise of the BAFIA, the Hire-Purchase Act 1967 and the Moneylenders Act 1951 to the hire purchase agreement in the instant case, there are more than sufficient, if not compelling bases to justify appellate intervention in order to correct a fundamental misdirection in law that has occasioned a judicial finding in the court below that cannot be defended, considering the evidence and the applicable law.

[58] Accordingly, I ruled that the decision of the sessions court be reversed and set aside, and this appeal be allowed, with costs of RM2,000 be awarded to the appellant.

Decision of the sessions court set aside and appeal allowed with costs of RM2,000.

Reported by Dzulqarnain Ab Fatar